In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-958

LOUIS CIRILLO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial, petitioner was convicted on both counts of a two count indictment charging him with (1) conspiracy to import heroin, to possess heroin with intent to distribute, and to distribute it in violation of 21 U.S.C. 846 and 963, and (2) the substantive offense of possession of heroin in violation of 21 U.S.C. 812, 841(a)(1) and 841(b)(2). He was sentenced to concurrent prison terms of 25 years, followed by concurrent special parole terms of six years.[1] The court of

[1] Petitioner was sentenced as a prior federal narcotics offender.

appeals affirmed in a comprehensive opinion which sets forth the facts of the case in detail (Pet. App. 1a-15a).

1. Petitioner's primary claim is that although the indictment charged one conspiracy involving two transactions, the facts in his view show two separate conspiracies, and, at most, his participation in the first conspiracy. He also contends that his character was improperly attacked at trial by testimony that he was prepared to have a key government witness murdered. Both of these contentions are answered in the opinion of the court of appeals (Pet. App. 8a-12a, 13a-15a) on which we rely.

2. Petitioner finally contends that the trial court erred in instructing the jury that they could consider hearsay statements of co-conspirators in determining his participation in the conspiracy. The court instructed the jury that (R. 990):

> His [Cirillo's] participation in the conspiracy, if you find one did exist, must be established by the independent evidence of Cirillo's own acts, his own statements and conduct, as well as those of the other alleged co-conspirators and the reasonable inferences to be drawn therefrom.

Petitioner contends that the jury should have been instructed that it may not consider the hearsay statements until it has determined from the non-hearsay evidence that the defendant was a member of the conspiracy.

The instruction given was proper under a long line of decisions in the Second Circuit holding that the trial

judge may instruct the jury that the participation of any defendant in a conspiracy can be established by evidence of the acts and statements of other alleged conspirators.[2] Under this rule the trial judge: "must determine, when all the evidence is in, whether in his view the prosecution has proved participation in the conspiracy, by the defendant against whom the hearsay is offered, by a fair preponderance of the evidence independent of the hearsay utterances. If it has, the utterances go to the jury for them to consider along with all the other evidence in determining whether they are convinced of defendant's guilt beyond a reasonable doubt. If it has not, the judge must instruct the jury to disregard the hearsay or, when this was so large a proportion of the proof as to render a cautionary instruction of doubtful utility * * * declare a mistrial if the defendant asks for it."[3] This rule is also followed in the Ninth, the Fifth and the Third Circuits. See, *Carbo* v. *United States,* 314 F. 2d 718 (C.A. 9), certiorari denied, 377 U.S. 953; *United States* v. *Bey,* 437 F. 2d 188 (C.A. 3); *Orser* v. *United States,* 362 F. 2d 580, 585-586 (C.A. 5).

The Second Circuit rule followed in this case results in a presentation of the issues to the jury in a simpler and more comprehensible fashion than was required under the older procedure contended for by petitioner. At the same time it safeguards the rights of the de-

---

[2] See cases cited in *United States* v. *Projansky,* 465 F. 2d 123, 137, n. 26 ((C.A. 2), certiorari denied, Nos. 72-135 and 72-272, November 13, 1972.

[3] *United States* v. *Geaney,* 417 F. 2d 1116, 1120 (C.A. 2), certiorari denied *sub nom. Lynch* v. *United States,* 397 U.S. 1028.

fendant in that the judge must determine as a matter of law whether the evidence of his membership in the conspiracy is sufficient to warrant submission of that issue to the jury. As noted in *Carbo* v. *United States, supra,* 314 F. 2d at 737, this approach is consistent with the usual allocation of functions between judge and jury which assigns to the judge the task of deciding preliminary questions of fact determinative of the admissibility of evidence. Under the older rule the jury made this initial determination. Whichever rule is applied, however, once that initial determination is made the jury may properly consider all the evidence including declarations of co-conspirators in determining guilt beyond a reasonable doubt. Since it is established that only slight evidence is necessary to show a defendant's connection with an existing conspiracy for these purposes, it is evident that the difference in the two methods of presentation is more theoretical than real. That is particularly so in a case such as this, where, as the opinion below shows, there was ample evidence of acts and statements by petitioner to establish his connection with the conspiracy.[4]

This Court has not considered this difference in procedure among the Circuits to be an issue requiring resolution. See *United States* v. *Jacobs,* 431 F. 2d 754 (C.A. 2), certiorari denied, 402 U.S. 950; *Carbo* v.

---

[4] Petitioner's argument evidences some confusion as to what constitutes hearsay. The acts and statements of petitioner and the acts of the other conspirators testified to by the government's witnesses and the real evidence, such as the paper with the telephone numbers and addresses of petitioner, were not hearsay and were ample to show petitioner's connection with the conspiracy.

United States, 314 F. 2d 718 (C.A. 9), certiorari denied, 377 U.S. 953; *United States* v. *Projansky*, 465 F. 2d 123 (C.A. 2), certiorari denied, November 13, 1972, Nos. 72-135 and 72-272. There is no reason to review that issue in this case.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

FEBRUARY 1973.

☆U.S. Government Printing Office: 1973—495-158/229